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No. 82-326

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

CHARLES N. STEELE*
General Counsel
RICHARD B. BADER
Assistant General Counsel
CAROLYN U. OLIPHANT
Special Assistant General Counsel
JEFFREY H. BOWMAN
Attorney
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 376-5432

*Counsel of Record

OCTOBER 18, 1982

QUESTION PRESENTED

1. Whether this Court should summarily affirm the unanimous *en banc* decision of the court of appeals that Congress's decision not to prohibit totally corporate solicitation of executive and administrative personnel is consistent with the First and Fifth Amendments to the United States Constitution.*

*The other parties to this proceeding include William W. Winpisinger, Judy Reardon, Rebecca J. Ward, Anne S. Morrison, Alan B. Morrison and Eugene Glover. Also named as a defendant was Robert O. Tiernan, Chairman of the Federal Election Commission. Mr. Tiernan is no longer a Commission member; currently Mr. Frank P. Reiche is the Commission Chairman.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Procedural History of the Case	2
B. Historical Development of the Provision Permitting Corporate Solicitation of Executive and Administrative Personnel	5
ARGUMENT	10
THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION BELOW BECAUSE THE QUESTIONS CERTIFIED WERE DECIDED PROPERLY BY THE UNANIMOUS *EN BANC* COURT OF APPEALS	10
A. The Court of Appeals Correctly Held That 2 U.S.C. § 441b(a) and § 441b(b)(2) Do Not Deny Union Appellants Equal Protection of the Law Under the Fifth Amendment	14
B. 2 U.S.C. § 441b(a) and § 441b(b)(2) Do Not Infringe the First Amendment Rights of Any of the Appellants	17
C. Corporate Payment of the Costs of Administering a Separate Segregated Fund Does Not Violate the First Amendment Rights of Stockholders	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977)	19
Adickes v. *Kress & Co.*, 398 U.S. 144 (1970)	19
Athens Lumber Co., v. *FEC*, 531 F. Supp. 765 (M.D. Ga. 1982), *appeal docketed*, No. 82-8102 (11th Cir. March 1, 1982)	11

Cases—Continued Page

Bread Political Action Committee v. *FEC*, 635 F.2d 621 (7th Cir. 1980) (en banc), *rev'd*, ___ U.S. ___, 102 S. Ct. 1235 (March 8, 1982) 12, 15

Buckley v. *Valeo*, 424 U.S. 1 (1976) 15, 16

California Medical Association v. *FEC*, 641 F.2d 619 (9th Cir. 1980) (en banc), *aff'd*, 453 U.S. 182 (1981) 12, 15

Carey v. *Population Services International*, 431 U.S. 678 (1977) 11

Citizens Against Rent Control v. *City of Berkeley*, ___ U.S. ___, 102 S. Ct. 434 (1981) 16

Craig v. *Boren*, 429 U.S. 190 (1976) 11

FEC v. *Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 101 S. Ct. 3151 (July 2, 1981) 12

FEC v. *National Education Association*, 457 F. Supp. 1102 (D.D.C. 1978) 12

FEC v. *National Right to Work Committee*, 665 F.2d 731 (D.C. Cir. 1981), *cert. granted*, No. 81-1506 (April 5, 1982) 13

FEC v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978) 12

First National Bank of Boston v. *Bellotti*, 435 U.S. 765, *reh. denied*, 438 U.S. 907 (1978) 19, 20

International Association of Machinists v. *FEC*, 672 F.2d 894 (D.C. Cir. 1981) (en banc), *cert. denied* ___ U.S. ___, 102 S. Ct. 2237 (May 17, 1982) 4

International Association of Machinists v. *Street*, 367 U.S. 740 (1961) 18

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) .. 11

Republican National Committee v. *FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980) 14, 15

Rogers v. *Herman Lodge*, ___ U.S. ___, 102 S. Ct. 3272 (July 1, 1982) 19, 21

Schwartz v. *Romnes*, 357 F. Supp. 30 (S.D.N.Y. 1973) *rev'd*, 495 F.2d 844 (2d Cir. 1974) 12

Cases—Continued	Page
Singleton v. *Wolfe*, 428 U.S. 106 (1976)	11
United States v. *Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973)	12
United States v. *Brewers' Association*, 239 F.163 (W.D. Pa. 1916)	12
United States v. *Chestnut*, 533 F.2d 40 (2d Cir.) *cert. denied*, 429 U.S. 829 (1976)	12
United States v. *CIO*, 335 U.S. 106 (1948)	6
United States v. *Clifford*, 409 F. Supp. 1070 (E.D.N.Y. 1976)	12
United States v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd*, 407 U.S. 385 (1972)	6, 7, 12, 17
United States v. *UAW*, 352 U.S. 567 (1957)	6
Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, 102 S. Ct. 752 (January 12, 1982)	11

Statutes and Regulations	
2 U.S.C. § 437g(a)(8)	3
§ 437h	4, 13
§ 437h(a)	3
§ 441b	5, 6, 11, 12, 14
§ 441b(a)	3, 12, 14, 16, 17
§ 441b(b)	13
§ 441b(b)(2)	3, 14, 16, 17
§ 441(b)(2)(A)	4, 6
§ 441b(b)(2)(B)	6
§ 441b(b)(2)(C)	6
§ 441b(b)(3)(A)	2
§ 441b(b)(3)(B)	10
§ 441b(b)(3)(C)	10
§ 441b(b)(4)(B)	8
§ 441b(b)(4)(D)	15
Former 18 U.S.C. § 610	5, 6, 9
Act of January 26, 1970 (Tillman Act), 34 Stat. 864 (1907)	5
Federal Corrupt Practices Act of 1925, 43 Stat. 1070 (1925)	5

Statutes and Regulations—Continued — Page

War Labor Disputes Act of 1943 (Smith-Connally Act) 57 Stat. 163 (1943) 5

Labor Management Relations Act of 1947 (Taft-Hartley Act) 61 Stat. 159 (1947) 5

Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) 3

Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) 3

Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) 3

Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977) 3

Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) 3

Legislative History

117 Cong. Rec. 43,379 (1971) 6

117 Cong. Rec. 43,381 (1971) 7

117 Cong. Rec. H11478 (daily ed. Nov. 30, 1971) 9

117 Cong. Rec. H11482 (daily ed. Nov. 30, 1971) 9

H.R. Rep. No. 917, 94th Cong., 2d Sess. (1976) 7

Miscellaneous

United States Constitution, Art. III, § 2 10

First Amendment, United States Constitution 3, 4, 5, 13, 16, 20

Fifth Amendment, United States Constitution .. 3, 4, 13, 15

Advisory Opinion 1975-23, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5151 (1975) 8

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MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

Appellee Federal Election Commission ("the Commission" or "FEC") moves to affirm the decision of the court of appeals *en banc* on the grounds that the questions presented were correctly decided by the court below and do not warrant further review.

OPINIONS BELOW

The unanimous *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 678 F.2d 1092 (D.C. Cir. 1982) and appears

in the appendix to appellants' Jurisdictional Statement ("J.S. App.") at 1a. The opinion of the United States District Court for the District of Columbia is reported at 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9144 at 51,104. The June 3, 1981, order of the district court certifying constitutional questions to the court of appeals is not published and appears at J.S. App. 64a.

STATUTES INVOLVED

The relevant statutory provisions are set out at J.S. App. 73a-77a.

STATEMENT OF THE CASE

The procedural history of this case is set forth in Section A below. Section B outlines the development of the statutory exceptions which appellants challenge as unconstitutional.

A. Procedural History of the Case

On October 9, 1979, the International Association of Machinists and Aerospace Workers ("IAM") and the six individual appellants filed an administrative complaint with the Commission naming eleven corporations and their political action committees as respondents. The complaint alleged that solicitations of executive and administrative personnel by the named corporations for contributions to their separate segregated funds were coercive and violated 2 U.S.C. § 441b(b)(3)(A). On December 13, 1979, the Commission unanimously determined that there was no reason to believe that respondents had violated portions of the Federal Election Campaign Act, 2 U.S.C. §§ 431, *et seq.* ("FECA"

or "the Act")[1] and, accordingly, dismissed the IAM complaint.

On February 4, 1980, IAM filed a complaint in district court seeking declaratory and injunctive relief against the Commission and alleging four causes of action. The first cause of action sought a declaration under 2 U.S.C. § 437g(a)(8) that the Commission's dismissal of the administrative complaint filed by IAM was contrary to law. In the event that the relief requested in plaintiffs' first cause of action was denied, IAM's second, third and fourth causes of action sought certification to the court of appeals, pursuant to 2 U.S.C. § 437h(a), of three constitutional questions regarding the validity of portions of the Act.

Appellants alleged in these last three causes of action that 2 U.S.C. § 441b(a) and § 441b(b)(2) were unconstitutional on first and fifth amendment grounds. Each of their constitutional claims is based upon alleged harm flowing from Congress's failure to prohibit corporate solicitation of executive and administrative personnel. No executive and administrative employees were plaintiffs to the action. The second cause of action alleged that the provision of FECA which permits corporations to solicit executive and administrative personnel for contributions to a separate segregated fund infringes upon the first amendment rights of executive and

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub., L. No. 96-187, 93 Stat. 1339.

administrative personnel. The third cause alleged that this provision creates an unconstitutional imbalance between the ability of corporations and labor organizations to raise money for political purposes, in violation of the first and fifth amendment rights of labor organizations and their members. The final cause of action alleged that this provision infringes the first amendment rights of any corporate stockholders who might disagree with the corporation's political activities.

On December 16, 1980, the district court granted summary judgment to the Commission on IAM's first cause of action,[2] finding that the Commission's dismissal of appellants' administrative complaint was proper. The court then turned to IAM's constitutional challenge, rejected the Commission's contention that appellants lack standing to raise their challenge, and ordered the preparation of constitutional questions and findings of fact. On June 3, 1981, the district court certified the three constitutional questions to the *en banc* court of appeals.

On April 6, 1982, a unanimous court of appeals *en banc* upheld the constitutionality of the challenged provisions, answering all three certified questions in the

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[2] Thus, in the court of appeals, appellants' original complaint became two cases—one was the review of the Commission's dismissal of the administrative complaint and the other was this case certified pursuant to 2 U.S.C. § 437h. On October 26, 1981, the *en banc* court of appeals unanimously affirmed the dismissal of IAM's administrative complaint by the Commission. *IAM v. FEC*, 672 F.2d 894 (D.C. Cir. 1981) (en banc). On March 11, 1982, IAM filed a petition for a *writ of certiorari* requesting this Court to decide that the solicitation methods and practices of various corporations were coercive and thus violated 2 U.S.C. § 441b(b)(2)(A). On May 17, 1982, this Court entered an order denying the petition. *IAM v. FEC*, ___ U.S. ___, 102 S. Ct. 2237 (May 17, 1982).

negative. In rejecting IAM's constitutional challenges, the court found that FECA, as amended in 1976, does not create an unconstitutional imbalance between corporations and labor organizations; concluded that corporate solicitation of executive and administrative personnel does not unconstitutionally infringe upon the first amendment rights of these employees; and held that use of corporate assets to support the costs of administering a separate segregated fund does not violate the first amendment rights of stockholders.

B. Historical Development of the Provision Permitting Corporate Solicitation of Executive and Administrative Personnel

Congress's decision not to prohibit totally corporate solicitation of executive and administrative personnel evolved during the history of the statute and demonstrates congressional concern that contributions to separate segregated funds be voluntary. In 1971, Congress reenacted the overall prohibition against corporate and labor organization contributions in connection with federal elections.[3] In addition, the 1972 amendments con-

[3] Concern over aggregations of corporate wealth being used to influence federal elections led to congressional passage in 1907 of the first statutory prohibition of corporate political contributions, in the Tillman Act, Chapter 420, 34 Stat. 864 (1907). In 1925, the Tillman Act was expanded and incorporated into the Federal Corrupt Practices Act, 43 Stat. 1070. The prohibition on political contributions was extended to labor organizations, first temporarily by the War Labor Disputes Act, 57 Stat. 163, in 1943, and then permanently by the Labor Management Relations Act (Taft-Hartley) of 1947, 61 Stat. 159, which also broadened the prohibition to include expenditures as well as contributions. In 1948, the prohibition was re-enacted, without substantive change, as 18 U.S.C. § 610. The evolution of the predecessor of 2 U.S.C. § 441b,

tained three express exceptions to the overall prohibition, currently codified at 2 U.S.C. § 441b(b)(2)(A)-(C), which provide several additional avenues for the participation of these groups in the election process. One of these exceptions provides that a corporation or labor organization may use treasury funds for the establishment, administration, and solicitation of voluntary contributions to a separate segregated fund for political purposes. 2 U.S.C. § 441b(b)(2)(C). It is this provision which is at issue in this case.

Congressman Hansen, sponsor of the amendment which became Section 441b(b)(2)(C), explained its purposes as follows:

> It spells out more clearly the rules governing election activities that apply equally to labor unions and corporations. While prohibiting abuses that involve activities directed at the general public, the amendment recognizes that the constitutional guarantee of free speech protects the right of labor organizations and corporations to communicate with their own members or stockholders.

117 Cong. Rec. 43,379 (1971) (remarks of Rep. Hansen). As this Court has observed, the 1971 legislative history of FECA establishes that the limited exceptions to § 441b were the result of Congress's careful balancing of competing interests:

> At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a

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18 U.S.C. § 610, through the 1971 legislation, is fully set forth in *Pipefitters v. United States*, 407 U.S. 385 (1972); *United States v. UAW*, 352 U.S. 567 (1957); and *United States v. CIO*, 335 U.S. 106 (1948).

> strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into the clear and unequivocal statutory language.

Pipefitters v. United States, 407 U.S. at 431, *quoting* 117 Cong. Rec. 43, 381 (1971).

In 1976, Congress reaffirmed the long-standing prohibition on the use of corporate treasury funds in connection with federal elections, retained the exception permitting corporations and labor organizations to solicit those individuals discussed in *Pipefitters* (corporate stockholders and union members), and added a corporation's own executive and administrative personnel and their families to the list of permissible solicitees, concluding that these management personnel were "roughly comparable" to stockholders of the corporation.[4] This

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[4] In its report to accompany H.R. 12406, the Committee on House Administration stated:

> [T]he bill broadens the permission contained in the present law to allow corporations to communicate with and solicit voluntary contributions from "executive officers." The Committee believes that management personnel as well as stockholders should be considered to be among the beneficial owners of a corporation ... H.R. 12406 continues the rule that unions may only solicit those they represent—their members—and reaffirms the intent of the 1971 Congress that corporations must also confine their activities to a roughly comparable group—namely, stockholders and executive officers.

H.R. Rep. No. 917, 94th Cong., 2d Sess. 7 (1976).

amendment was in response to an Advisory Opinion ("AO") the Commission had issued to SunPAC, AO 1975-23, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5151 (1975), which concluded that corporations could solicit all employees. During the debate on the 1976 Amendments, and in light of SunPAC, Congress gave extensive and serious consideration to the question of the appropriate limitations on solicitation by corporations and labor organizations for contributions to their separate segregated funds. Congress rejected the Commission's interpretation and, instead, amended the statute to permit unlimited corporate solicitation only of executive and administrative employees. Congress also provided that under certain circumstances a corporation could solicit contributions no more than twice yearly from any of its other employees, and any labor organization representing employees of the corporation could solicit no more than twice yearly from all stockholders, and executive and administrative employees and their families. 2 U.S.C. § 441b(b)(4)(B).

In both 1971 and 1976 Congress also added provisions to the Act designed to minimize the possibility of coercive solicitation of contributions to a separate segregated fund. Representative Hansen, the author of the 1971 exception, explained how Congress acted on these concerns:

> The essential prerequisite for the validity of such political funds is that the contributions to them be voluntary. For that reason the final section of this amendment makes it a violation of section 610 to use physical force, job discrimination, financial reprisals or the threat thereof, in seeking contributions. This is intended to insure that a solicitor for

> COPE or BIPAC cannot abuse his organizational authority in seeking political contributions. Of course, nothing can completely erase some residual effects on this score, any more than the law can control the mental reaction of a businessman asked for a contribution by an individual who happens to be his banker, or a farmer approached by the head of his local farm organization. The proper approach, and the one adopted here, is to provide the strong assurance that a refusal to contribute will not lead to reprisals and to leave the rest to the independence and good sense of each individual.

117 Cong. Rec. H11478 (daily ed. Nov. 30, 1971) (remarks of Rep. Hansen). *See also* 117 Cong. Rec. H11482 (daily ed. Nov. 30, 1971) (remarks of Rep. Thompson). Thus, Congress enacted the provision permitting the establishment of separate segregated funds with the following condition:

> That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, financial reprisal or by dues, fees, or other monies required as a condition of employment, or by monies obtained in any commercial transaction.

18 U.S.C. § 610 as amended by section 205 of FECA of 1971.

In 1976, the Congress expanded the statute's protection against coercive solicitation of employees by their employer or labor organization. Two additional measures were enacted to protect against coercion: a requirement that all solicited employees must be informed at the time of the solicitation of the political purposes of the solicitation, currently 2 U.S.C.

§ 441b(b)(3)(B); and a requirement that all solicited employees must be informed at the time of the solicitation of their right to refuse to contribute without reprisal, currently 2 U.S.C. § 441b(b)(3)(C).

ARGUMENT

THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION BELOW BECAUSE THE QUESTIONS CERTIFIED WERE DECIDED PROPERLY BY THE UNANIMOUS *EN BANC* COURT OF APPEALS

Although phrased in terms of three causes of action, each of which resulted in a certified question to the court of appeals, discussed *infra* at 14–21, there is in reality only one issue presented to this Court for review: appellants' essential argument that the Constitution requires Congress to prohibit employer solicitation of executive and administrative employees. For appellants' contention that the specific provisions enacted by Congress to protect against coerced contribution are insufficient rests on the premise that the very nature of the employment relationship makes such contributions involuntary.[5]

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[5] The Commission maintains, as it did below, that appellants have not made a threshold showing of a distinct and palpable injury of a level sufficient to satisfy the standing requirements of Article III, Sec. 2 of the Constitution. Appellants claim to assert the interests of solicited corporate employees, unions and their members, and corporate stockholders of corporations administering separate segregated funds. Each of these causes of action purports to assert a separate harm, yet each is, at bottom, another assertion that corporate executive and administrative personnel are coercively and thus unconstitutionally solicited, if solicited at all. However none of the plaintiffs in this action are corporate execu-

Contrary to the impression given by their Jurisdictional Statement, J.S. 16–18, appellants here have not challenged the long-standing prohibition on corporate and labor organization contributions and expenditures in connection with federal elections,[6] 2 U.S.C.

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tive or administrative employees, and plaintiffs have been unable to point to a single executive or administrative employee who has ever claimed to have been subjected to coercion, or to have contributed to a separate segregated fund because of coercion. Thus, appellants lack standing to challenge the constitutionality of the Act for assertedly failing to protect adequately executive and administrative personnel not before the Court from coercive solicitation. *Singleton v. Wolfe*, 428 U.S. 106, 114-16 (1976); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, 102 S. Ct. 752 (January 12, 1982).

[6] Indeed, in *Athens Lumber Co. v. FEC*, 531 F. Supp. 756 (M.D. Ga. 1982), *appeal docketed*, No. 82-8102 (11th Cir. March 1, 1982) (action challenging the § 441b general prohibition), the IAM unsuccessfully sought to intervene on the side of the Commission to defend the constitutionality of the statute's prohibition of contributions and expenditures by corporations and labor organizations in connection with any federal election.

§ 441b.[7] Rather, they allege that the statutory prohibition should be extended further.[8]

Appellants' challenge is supported only by their assumption that solicitation of executive and administrative employees results in involuntary contributions to a separate segregated fund. Yet the Act explicitly prohibits both the use and the threat of employment-related coercion in the solicitation of contributions to

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[7] There is no conflict among the circuits as to the constitutionality of 2 U.S.C. § 441b(a). Numerous federal courts have held the prohibition of union and corporate contributions and expenditures constitutional in the context of specific cases. *California Medical Association v. FEC*, 641 F.2d 619 (9th Cir. 1980) (en banc), *aff'd*, 453 U.S. 182 (1981); *Bread Political Action Committee v. FEC*, 635 F.2d 621 (7th Cir. 1980) (en banc), *rev'd on other grounds*, ___ U.S. ___, 102 S. Ct. 1235 (March 8, 1982); *FEC v. Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 101 S. Ct. 3151 (July 2, 1981); *United States v. Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *FEC v. National Educational Association*, 457 F. Supp. 1102 (D.D.C. 1978); *FEC v. Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States v. Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *Schwartz v. Romnes*, 357 F. Supp. 30 (S.D.N.Y. 1973), *rev'd on other grounds*, 495 F.2d 844 (2d Cir. 1974); *United States v. Brewers' Association*, 239 F. 163 (W.D. Pa. 1916).

[8] Appellants argue to this Court that strict scrutiny must be applied in this case because they contend it would be the appropriate standard of review if the overall prohibition were challenged. J.S. 16–17. This contention is erroneous. The lower court properly rejected this argument, because it is not the constitutionality of the underlying prohibition which is at issue, but rather whether it was unconstitutional for Congress to decline to prohibit corporate solicitation of executive and administrative personnel for contributions to the corporation's separate segregated fund. Congress's decision not to prohibit this solicitation is not a restriction on activity protected by the first amendment.

separate segregated funds maintained both by labor organizations and corporations, 2 U.S.C. § 441b(b). While their Jurisdictional Statement (J.S.7–13), reviews certain solicitation methods contended to be coercive, the question of whether appellants presented sufficient evidence that these corporations engaged in coercive practices prohibited by the statute is not the issue in this case. For as noted above, this Court declined to review the court of appeals' decision affirming the Commission's dismissal of appellants' administrative complaint which alleged that the particular corporations had engaged in coercive practices. *See* n. 2, *supra*.[9] The question before this Court is whether or not the court of appeals correctly concluded that the Constitution does not require Congress to prohibit such solicitation entirely. The answer to each certified question, as set forth below, is that there is no evidence that Congress's decision to prohibit coercive solicitations is insufficient to protect the first and fifth amendment rights of appellants, or the first amendment rights of corporate executive and administrative personnel not before this Court.[10]

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[9] Under 2 U.S.C. § 437h, appellants may only challenge "the constitutionality of any provisions" of FECA. Appellants' challenge to the propriety of specific corporate solicitation methods, *see* J.S. 7-10, must be construed as a challenge to the FECA as applied. Insofar as appellants' challenge attacks the application of FECA and does not present a challenge to a provision of FECA on its face, § 437h does not afford this Court jurisdiction.

[10] Appellants urge this Court to hear the instant case because it enjoys a certain "symmetry" with a case currently before this Court, *FEC v. National Right to Work Committee*, 665 F.2d 731 (D.C.Cir. 1981), *cert. granted*, No. 81-1506 (April 5, 1982). J.S. 20-23. Wholly unlike the present appeal, *FEC v. NRWC* involves the question of whether, contrary to the Act's limitations, a corpo-

A. The Court of Appeals Correctly Held That 2 U.S.C. § 441b(a) and § 441b(b)(2) Do Not Deny Union Appellants Equal Protection of the Law Under the Fifth Amendment.

The court below correctly held that Congress's decision in 1976 to allow corporate solicitation of voluntary contributions from executive and administrative personnel does not deny equal protection of the law to unions or their members under the fifth amendment. The court of appeals noted that "the difference in organizational structures [between corporations and labor unions] allows Congress to shape the election laws to reflect those differences," J.S. App. 32a, and concluded that:

> Congress, in 1971 and 1976, attempted to treat corporations and labor unions in a relatively comparable manner. We hold that the 1976 amendments the plaintiffs challenge are substantially related to this important objective, and therefore do not deprive plaintiffs of equal protection.

J.S. App. 34a.

This Court affirmed the conclusion of another court that the provisions of § 441b limiting the activities of corporations and labor organization "are evenhanded and entirely neutral on their face." *Republican National Committee* v. *FEC*, 487 F. Supp. 280, 288 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S.

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ration without capital stock may solicit anyone *outside* the corporation who it considers to have evidenced a "similar political philosophy." That case has nothing to do with the issue presented here regarding *internal* corporate solicitation, expressly permitted by the statute. Thus, the Commission disagrees that the two cases are related, and submits that there is no reason for them to be heard together.

955 (1980). "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley* v. *Valeo*, 424 U.S. 1, 32 (1976).

As this Court recognized in *California Medical Association* v. *FEC*, 453 U.S. at 201:

> The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.

Likewise, the United States Court of Appeals for the Seventh Circuit upheld the distinction made in 2 U.S.C. § 441b(b)(4)(D) between corporations, labor organizations and trade associations against an equal protection challenge under the fifth amendment due process clause. *Bread Political Action Committee* v. *FEC*, *supra*. The Seventh Circuit found that any dissimilar treatment:

> follows from the rather obvious fact that each of the different groups has a different kind of constituency and that each require somewhat different regulation to curb abuses the Act was intended to halt. Regulatory distinctions and exceptions tailored to serve a substantial governmental interest, as here, do not violate the fifth amendment's equal protection provision. *See Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 98-99, 99 S.Ct. 2286, 2291, 33 L.Ed. 212.

635 F.2d at 630. Thus, the decision of the *en banc* court of appeals in the instant case that the regulation of these different types of organizations need not be identical is entirely consistent with the decisions of this Court and other courts of appeals.

The court properly found that any attempt to equalize the speech of corporate and labor organization separate segregated funds would directly conflict with previous decisions of this Court. *Id. See Buckley* v. *Valeo*, 424 U.S. at 48-49 ("[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"), *quoted in Citizens Against Rent Control* v. *City of Berkeley*, ___ U.S. ___, 102 S.Ct. 434, 437 (1981). Moreover, in rejecting appellants' argument that 2 U.S.C. § 441b(a) and § 441b(b)(2) create an unconstitutional economic imbalance between corporations and labor unions, the *en banc* court observed that the evidence presented by appellants that the 1976 amendments had created an imbalance between the ability of corporations and labor organizations to accumulate money in their separate segregated funds was, at best, equivocal. J.S. App. 24a n. 49. The court also recognized that "[i]t is unlikely that Congress will ever be able to achieve a perfect balance between the relative influence of corporations and labor unions in federal elections." J.S. App. 34a.

Consistent with well established precedent as articulated by this Court and lower federal courts, the court of appeals properly answered in the negative the second question certified by the district court. This Court should summarily affirm the decision of the court of appeals.

B. 2 U.S.C. § 441b(a) and § 441b(b)(2) Do Not Infringe the First Amendment Rights of Any of the Appellants.

The court of appeals also correctly held that "the in-person, group and supervisor solicitations of career employees that the statute allows, subject to control against abuse, does not unconstitutionally encroach upon individual rights of political association and expression." J.S. App. 47a. As the court noted, appellants failed to produce any evidence in the record to support their argument that *any* corporate solicitation of executive and administrative personnel whatsoever is inherently coercive. "On the record before us," the court stated, "it suffices to say that the proof plaintiffs offer falls woefully short." *Id.* at 39a. The court rejected as "misleading," J.S. App. 38a n.82, appellants' attempts to show that corporate solicitation of executive and administrative personnel is inherently coercive through the use of various charts and statistics. Indeed, as the *en banc* court noted, the contribution rate of the named corporations' executive and administrative personnel disclosed by the record was comparable to the rate of contributions to the CIO separate segregated fund (800,000 out five million members, or 16%) which this Court found in *Pipefitters* v. *United States*, 407 U.S. at 418 n.30, demonstrated the voluntariness of the contributions. Certainly, a review of the unanimous *en banc* court's factual determinations from the evidentiary record does not merit this Court's plenary review.

Moreover, Congress has repeatedly fine-tuned this statute in an effort to minimize the possibility of such coercion. *See supra* at 5–10. The court below

properly recognized that "[t]he judgment of Congress in this domain, as [*United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973)] suggests, is entitled to particular respect," and found that the "legislative history demonstrates congressional attention to the multi-faceted speech and political participation concerns at stake." J.S. App. 45a. The court concluded:

> On the record before us, and in view of the safeguards against coercion with which Congress has brigaded corporate PAC solicitation, we cannot conclude that such solicitation inevitably forces career employees to compromise their political beliefs in order to avoid jeopardizing their corporate positions.

J.S. App. 36a-37a (footnotes omitted).

Appellants maintain that the matter they wish this Court to review is "the *tainted solicitation methods* used by ... corporations." J.S. 18. However, as discussed above, *supra* at 13, this argument is not properly before the Court in this case, because it was resolved by this Court's denial of *certiorari* in the earlier case. Appellants have presented no new argument here which would warrant reconsideration of that decision. Thus, this Court should affirm the decision of the *en banc* court below.

C. Corporate Payment of the Costs of Administering a Separate Segregated Fund Does Not Violate the First Amendment Rights of Stockholders.

The court of appeals also properly answered the third certified question in the negative. Citing *International Association of Machinists* v. *Street*, 367 U.S. 740

(1961) and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), appellants claimed that stockholders have a right not to have corporate funds spent for political purposes. The court below dismissed appellants' argument, relying upon this Court's decision in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978) to explain the "'critical distinction'" between those two cases and the instant case.[11] In *Bellotti*, this Court stated that "the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason." 435 U.S. at 788 n.34.[12] This Court then distinguished *Street* and *Abood* by noting:

> The critical distinction here is that no shareholder has been "compelled" to contribute anything.... A more relevant analogy, therefore, is the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue.

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[11] Judge Edwards would have rejected this challenge on "state action" grounds. J.S. App. 54a.

[12] Appellants argue, for the first time, that because of such considerations as the "prudent investment rule of ERISA" certain objecting stockholders may not be able to freely transfer their holdings. J.S. 22. Since this argument was not raised in the court of appeals, it cannot be raised in this Court. *Rogers v. Herman Lodge*, ___ U.S. ___, 102 S. Ct. 3272, 3281 (July 1, 1982), *citing Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, there is no indication from the record that any of these plaintiffs have in the past or will in the future invest in such a corporation, nor any indication that any such corporate separate segregated funds may support candidates whose interests conflict with those of union members. Additionally, the IAM fund is under no obligation under this statute to invest in corporations whose political committees support interests contrary to those of the IAM membership, and they cite no authority for their assertion that another statute might require them to do so.

435 U.S. at 794-95 n.34. Following this Court's opinion in *Bellotti*, the court of appeals found that:

> a dissenting shareholder in a publicly held company who does not allege any legal or practical obligation to continue his investment, is not compelled to speak, in violation of his First Amendment right to remain silent, by a statute authorizing a corporation to use a portion of its assets to establish and maintain the corporation's political action committee.

J.S. App. 53a.[13]

In this Court, appellants no longer argue that corporate financing of solicitation of employees to contribute to a separate segregated fund is unconstitutional on these grounds. Rather, they argue for the first time that a dissenting stockholder should receive some kind of a rebate for his or her share of the corporation's funds which may have been used to support political activity with which they may disagree. J.S. 20. Since this argument was not raised in the court of appeals, it

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[13] If the stockholders' claim is that corporate funds are being used improperly or improvidently by management and that the corporation (and its stockholders) are thereby suffering, then the appropriate remedy might be a stockholder derivative suit for *ultra vires* actions or breach of fiduciary duty. As this Court has recognized:

> Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intra-corporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

First National Bank of Boston v. Bellotti, 435 U.S. at 794-95.

cannot be asserted in this Court. *Rogers* v. *Herman Lodge*, *supra*. Moreover, this claim is not ripe. The Act does not prohibit corporate rebates to dissenting shareholders, and there is no allegation in their complaint that any of the appellants has sought and been denied such a rebate. Indeed, there is not even any evidence as to how much corporate money has been spent to solicit executive and administrative personnel and there has been no suggestion as to how such a rebate might fairly be calculated. This Court should reject appellants' argument and summarily affirm the decision of the court of appeals.

CONCLUSION

The Commission submits that this Court should summarily affirm the decision below because the *en banc* court of appeals correctly decided the substantive issues raised, properly applying principles established by this Court.

Respectfully submitted,

CHARLES N. STEELE*
General Counsel
RICHARD B. BADER
Assistant General Counsel
CAROLYN U. OLIPHANT
Special Assistant General Counsel
JEFFREY H. BOWMAN
Attorney
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

*Council of Record

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